United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original-Contains Affidavit of mailing

76-1118

To be argued by
DOUGLAS J. KRAMER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1118

UNITED STATES OF AMERICA,
Appellee,

—*against*—

JEROME MACKEY and WILLIAM NELSON,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Jerome Mackey and William Nelson appeal from judgments of the United States District Court for the Eastern District of New York (Weinstein, *J.*) entered on February 20, 1976, following a jury trial, convicting Jerome Mackey of six counts and William Nelson of fourteen counts of violating Title 18 U.S.C. §§ 1341 and 2, as charged in a twenty-one count indictment,[1] in that, for the purpose of executing a scheme and artifice to defraud prospective distributors of stereo tape recordings and to obtain money from these distributors by means of false and fraudulent pretenses, representations, and promises, they, along with the defendant Richard E. Taylor,[2] caused their advertis-

[1] Count Thirteen was dismissed on the motion of the Government (Trial transcript, p. 46).

[2] Defendant Taylor, who was a Government witness, pleaded guilty to a superseding information charging him with one count of conspiracy to commit mail fraud (Title 18, United States Code, § 371). He was sentenced to a fine of $1000 and put on probation for five years.

ing agents to place certain advertising matter in the mails. Appellant Nelson was found guilty of fourteen mailings dating from August 17, 1972 through November 11, 1972. Appellant Mackey was found guilty of six of those mailings, dating from October 8, 1972 through November 11, 1972. The appellants were sentenced to concurrent terms of five years on each count, with execution suspended on each term for 4½ years, and were placed on probation for the suspended portion of each term. Neither appellant is presently incarcerated.

Appellant Mackey raises three issues on appeal. He claims that there was insufficient evidence to support the verdict against him, that certain improper testimony was admitted, without objection, against him, and that his attorney-client privilege was violated before the grand jury.

Appellant Nelson also challenges the sufficiency of the evidence. In addition, he challenges that portion of the charge to the jury dealing with conscious avoidance, the refusal by the court to admit certain hearsay evidence, the alleged repugnancy between the verdicts of acquittal and guilt, and the refusal to grant an adjournment before trial.

Statement of Facts

Introduction

In the fall of 1972 salesmen for a company called Mackey Distributors, Inc. (hereinafter referred to as "MDI") were selling distributorships for stereo tape recordings for popular songs. For about $2375, a person was offered ten cabinets able to each hold forty tape recordings (159).[1] MDI offered to supply the cabinets

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[1] References are to the trial transcript.

and professional locators to place the cabinets (64-65, 200, 1069, 1158). MDI offered to provide the initial stock of tape recordings, advertised to be top label, top artist recordings, and offered to restock the cabinets with similar tapes (64, 157-159, 200, 499, 591, 1068-1069, 1157-1159). The prospective distributors were given projection sheets showing, for example, that if they sold 10 tapes a week they would earn $15,000 a year (592). They were given a list of allegedly successful distributors and urged to call them (74-76, 202, 503-504). The potential distributors were told that if their locations were not successful they would be given new ones (160). They were told that there was an ironclad guarantee that if they were not satisfied after one year they would get their investment returned (202, 500). The representations made by MDI proved to be false, with distributor-victims not receiving major label tapes, locations, promotional material, or even anything at all (Eg. 88-89, 137-142, 207-212, 1222-1233).

MDI was a corporation formed by Jerome Mackey, William Nelson and Richard Taylor in April 1972 for the alleged purpose of selling distributorships for the sale of stereo tape recordings and providing training, locations, and supplies to the distributors. Testimony concerning the creation of MDI was principally supplied by Richard E. Taylor, Vice-President of MDI, as well as William Ballerista, MDI's banker. Testimony concerning the false and fraudulent sales techniques, as hereinafter described was also supplied by Lester Fisher,[1] National Marketing Director for MDI, as well as eleven distributor-victims. Additional evidence concerning the appellants' involvement in the scheme and their knowledge of the fraud was supplied by Edith Ciro, the bookkeeper-secretary at MDI and James Diamond, an Oklahoma investment banker. Testimony concerning the mailings was given by Alan Nelson

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[1] Fisher had been given informal immunity (732).

(unrelated to the appellant) who headed the F&N Advertising Company.

The Creation of MDI

During the last week of March or first week of April, 1972, Richard Taylor met with Mackey and Nelson to discuss the possibility of creating a corporation to sell stereo tape distributorships (232-237). Taylor had previous experience selling tape distributorships and had taken Nelson on some of his sales trips (229-233). Nelson and Taylor had also previously discussed the possibility of setting up their own company and had approached a James Diamond, who operated the Bartlesville Investment Corporation, for capital (526-530). They also were looking for an established name to give their enterprise credibility (531). Diamond rejected the offer (531). Nelson then suggested that Mackey, his nephew, was "interested in anything that would make money" and that he might supply the capital (233).

At their initial meeting, Mackey was told about the stereo tape business. He was told that it would take a considerable amount of money to operate such a business and he was told about the problems that another company, with which Taylor had been associated, had encountered due to under-capitalization (235-236). The three men discussed the proposed sales pitch, which was similar to that previously used by Taylor (237). Mackey and Nelson were told that this sales pitch had created a lot of problems due to misrepresentations (237). They were told that they would be selling duplicated tapes, which might be illegal (237). The three men also discussed the need for a well-known name, such as Mackey's company, Jerome Mackey Judo, Inc., could supply (239).

About two weeks later the three men met again. Mackey had already incorporated MDI and rented office space (238, 242, 365). It was agreed that Mackey would

be President, Taylor, Executive Vice-President, and Nelson, Secretary-Treasurer (369). Profits would be shared one-third to each (241). Mackey announced that he would not put up the $50,000 that Taylor had said was necessary to avoid the problems of under-capitalization, but instead would put up only a limited amount (240). In April Mackey contacted Diamond, the Oklahoma investment banker, and asked him to lend $5,000 to Nelson and Taylor on Mackey's personal guarantee (534). The money was lent by a check for $5,000 dated May 8, 1972 (534). On May 16, 1972, however, the day after the Diamond check cleared, Mackey withdrew $5,000 from the MDI account and deposited it in his Jerome Mackey Judo account (917-918).

At that second meeting Mackey stated that he had investigated the legalities of duplicate tape sales and found it only to be a civil offense. Mackey stated that "his office could handle any complaints that came through [the Attorney General's] Office" (239). The three men reviewed the contract that would be used, which included a buy-back agreement (241). It was explained to Mackey that the buy-back agreement in the contract could cause serious problems in the future. Mackey replied that such a guarantee involved a corporate obligation and that there was no need to worry about it at that time (245).

Promotional material was prepared and seen by both Mackey and Nelson (250). A discussion was had among the three men concerning the use of "singers", persons who would give favorable reports about MDI to potential purchasers of distributorships (252). Mackey suggested a means of creating such references by setting up a distributorship and then purchasing tapes from it so as to produce a good sales volume (252-254). Mackey supplied a financial statement of Mackey Judo, Inc. to substantiate the financial strength of MDI, which was allegedly backed by Mackey Judo, Inc. (255-56). The initial newspaper advertisements or MDI were placed

by Mackey (372). It was agreed that Nelson and Taylor would be the salesmen (242).

Towards the latter part of June or early July, 1972 sales of distributorships in the Long Island area started to fall off (261). Complaints were starting to be received about the adequacy of locations and quality of tapes that MDI was supplying (262).[1] Discussions were had among the three men concerning the slow down in business, during which Mackey was asked for more money (266-268). Mackey rejected this request and suggested that rather than investing more money to cover obligations already incurred by MDI, more sales needed to generate the needed cash (268, 286, 288). To remedy this situation and to increase sales, Lester Fisher was hired (268-275).

The Entrance of Lester Fisher

Taylor and Mackey discussed Lester Fisher in July 1972. Taylor told Mackey that Fisher was a good salesman, but a congenital liar; that he was a man who would probably create a lot of problems through misrepresentations (270-271, 285). Taylor told Mackey that Fisher insisted on being able to advertise and offer ("pitch") major label tape recordings (273, 285). From Taylor, Mackey learned about "cut-outs" which were previously top selling, major label songs that no longer were selling well, and how these "cut-outs" might be supplied under the guise of major label tapes (273-275). Mackey agreed to this arrangement and said "If you think you can handle Fisher, let's go ahead and see if we can work our way up to sales [sic]" (275). Thus it was agreed that MDI would advertise major label tapes, but that "cut-outs" would be supplied, but that if they were not avail-

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[1] The tapes that were being supplied were "bootleg tapes", unauthorized duplicated tapes on unknown labels of out-dated songs as well as current tunes (230, 262-263).

able, "bootlegs" would be provided (275-276, 280). It was also explained to Mackey that MDI was out of funds and that if they proceeded with the planned sales operation, MDI would be committing itself to obligations it could not meet (277). It was agreed that Taylor would be responsible for handling complaints that might arise (280). Fisher was hired (271).

Fisher had previously met with Nelson and Taylor in April, 1972 at a motel on Long Island at which time Nelson and Taylor told Fisher that they had taped Fisher's sales pitch over the telephone (556, 558-559). Nelson and Taylor told Fisher about MDI, in particular that they had a good "checkout", a reference that a company gives out to make it appear to be reliable; in this case, Jerome Mackey Judo, Inc. (560). Nelson and Taylor told Fisher that they, along with Mackey, owned MDI (560-561).

On the day that Fisher arrived to work for MDI he had with him a check for $5,100 from a woman to whom he had sold a distributorship from a rival company, his previous employer, Economy Distributors. Fisher endorsed the check to MDI in what he called a "switchover". Mackey thereupon wrote Fisher a check for a commission on this "sale" (565-568). Fisher set about organizing a sales campaign along the lines that he had previously used. The placing of newspaper advertisements, contents of these ads, source of tapes, "singers list", use of projection sheets and literature (583) were discussed among Fisher, Nelson and Taylor (571-583). Fisher taught Nelson the new sales pitch (588-589, 594). Fisher described this pitch to the jury (598-594).[6]

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[6] The prospective customers met the salesman in rooms with posters of top artists and major label names hung on the walls (591). In the room there would be a cabinet full of major label tapes (589). The customer was told that these tapes could be reordered for $3.00 a piece (589). No mention was made of duplicated, bootleg, or cut-out tapes (589).

The customer was told that MDI furnished all locations (591).

[Footnote continued on following page]

Fisher had shown the advertising copy to Mackey, who had also approved the promotional literature prepared by Fisher (295, 302-303).[7] When Taylor mentioned Fisher's "singers list" to Mackey, Mackey laughed (307).

He was then given projections about how much he might earn from a given investment (591-592). The customer was told about Mackey Judo, Inc. and told to check on it (592). Lists of "references" were supplied (592). In the event that a customer rejected the offer, he was told that he was not acceptable to MDI, thus making him more susceptible to being resold (592-593).

[7] An example of such advertising copy is contained in Government's Exhibit 39A1. Reproduced below is an advertisement run in the Minneapolis *Star* and Minneapolis *Tribune*:

DISTRIBUTORSHIPS
PART OR FULL TIME
STEREO TAPES
ALL LABELS
TOP TUNES — TOP
ARTISTS
MEN OR WOMEN
OPENINGS IN ALL
AREAS — NO TRAVEL

All you do is restock & collect from accounts established for you. Supermarkets, variety stores, new car dealers, gas stations, drug stores, dept. stores. No experience — we train you. Join this multi-million $$ business sweeping your local area.

MONEY BACK
GUARANTEE
IRONCLAD CONTRACT
TO YOU

You have a cash investment from $2,375 to $9,500 depending on area and income you want. Let your banker or lawyer investigate this.

Call Mr. Bill Nelson, collect (612) 332-0378. Or write or call collect Mr. Hardy, Mackey Distributors, Suite 209, 175 Fulton Ave., Hempstead, NY 11550 (516) 292-8290.

Promotional literature was introduced as Government's Exhibits 17A and 17B.

The Fall Sales Campaign

Thereafter the sales campaign began in earnest. Advertisements were placed in numerous newspapers by use of the mails (1108-1123). Testimony from distributor-victims, all of whom were sold after Fisher had been hired, established the sales technique (pitch) that was used (eg. 63-66, 199-201, 1221-1222). Nelson gave at least one of the pitches (1155-1166).

During the sales campaign, Taylor kept Mackey informed about the progress of business (316, 320). Mackey stated that he was pleased with Fisher and with the method chosen for selling themselves out of their problems (320).

The Customer Complaints

By late September or early October, 1972 the complaints being received by Taylor at MDI were almost "unbearable" (321). Taylor would tell the complaining distributor-victims anything he could think of to stall for time (323). Taylor discussed the volume of complaints with Nelson, who said "well, I'm glad it's your job, and it's not mine" (323-324).

In the latter part of September and middle of October, 1972 Taylor spoke to Mackey about the volume of complaints being received at MDI (225, 329; see also 771-776). Taylor told Mackey that he had just about run out of anything to tell the complainants (225). Mackey said that he too was receiving telephone calls and he wanted to know why Taylor could not handle the complaints (325, 336). Mackey told Taylor that it was Taylor's job to keep these people away from him (330). Mackey's exact words were "keep them off my ass" (331). Mackey wanted to remain insulated (485). Several distributor-

victims described subsequent telephone conversations with Mackey (e.g. 1084-1085, 1195-1207, 1231) as well as with Nelson (e.g. 140-155, 184, 522-524, 1093, 1196-1197, 1225-1229) in which they were promised that their problems would be resolved.

Following a meeting around Thanksgiving, Taylor and Fisher resigned (607, 610, 344). Thereafter Mackey asked Edith Ciro, the bookkeeper-secretary to do an audit of MDI's books (785). Prior to this request Mackey had been the only person receiving MDI's cancelled checks and bank statements and Ciro had not had access to them (758-760, 787). Ciro told Mackey that she did not have enough experience to do an audit (785). Subsequently, Ciro overheard Mackey and Nelson discussing the transfer of funds from MDI to a new corporation, Neltay, during which they said that if anybody tried to sue MDI they would be unable to recover any money because all the money was now in the Neltay account (795-796). Despite the transfer of all of MDI's assets, Nelson continued to accept checks from distributor-victims made out to MDI (797).

The Defense

The appellants did not testify, but based on the cross-examination of prosecution witnesses, the witnesses offered by the defense, and the summations, it was their defense that they acted in good faith and in ignorance of the falsity of the representations being made. The appellants attempted to portray themselves as victims of Fisher and Taylor, much as were the distributors.

Besides presenting character witnesses, the defense attempted to discredit Taylor* and Fisher. Dallas McCoy

*It was stipulated that on December 6, 1972, Mackey and Nelson made a complaint about Taylor to the District Attorney of Nassau County (1264).

testified that he and Taylor formed a company called B & G Sales to sell tapes to MDI (1266-1267). He testified that though he received some payments from MDI, he made no profit (1268). Robert McGovern testified that at Taylor's request, he supervised a warehouse for tapes for MDI (1279-1280). McGovern was an employee of MDI (1287). Thereafter, Taylor set up a new corporation with McGovern, "MTM", to sell tapes to MDI (1287-1288). Subsequent to Taylor's resignation from MDI, Mackey met with McGovern and asked him to invest money in MDI (1308, 1312-1314). John Merrit, the owner of the Squire Grill and Restaurant, testified that his partner heard Fisher admit to being a "flim-flam man" (1362-1363). His partner also heard Taylor admit that when he got the money he was going to take off (1363).

ARGUMENT

POINT I

There was sufficient evidence to support the verdicts against appellants.

Appellants Mackey and Nelson argue that there was no evidence that they knowingly participated in or aided the fraudulent scheme. Both appellants point to the jury verdict, which acquitted them of the counts dealing with the mailing of checks by distributor-victims to MDI, and which acquitted Mackey of the Counts dealing with the mailing of advertisements prior to October 1, 1972, as proof that the jury didn't find the requisite elements of knowledge.

In determining whether there was sufficient evidence to sustain a verdict, this Court will view the evidence in the light favorable to the government. *Glasser* v.

United States, 315 U.S. 60 (1942); *United States* v. *Castellana*, 349 F.2d 264, 267 (2d Cir.), *cert. denied*, 383 U.S. 928 (1966). All permissible inferences are to be construed in the Government's favor. *United States* v. *Marchisio*, 344 F.2d 653, 662 (2d Cir. 1965); *United States* v. *Dardi*, 330 F.2d 316, 325 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964).

To violate the mail fraud statute, a person need not have been a party to the formation of the fraudulent scheme. *United States* v. *Finkelstein*, 526 F.2d 517, 527 (2d Cir. 1975). It is only necessary that he participate in the scheme and that it was foreseeable that the scheme involve the use of the mails. *Id.* Participation in the scheme by officers of a corporation does not require direct knowledge of the falsity of representations being made by the corporation's employees. Review and approval of the fraudulent corporate activities may supply a basis from which the jury may infer knowledge. *United States* v. *Andreadis*, 366 F.2d 423, 430 (2d Cir.), *cert. denied*, 385 U.S. 1001 (1967).

Appellant Nelson was found guilty of every one of the counts dealing with the mailing of advertisements. The evidence showed that Nelson had pre-MDI experience in the sale of stereo tape distributionships with Taylor and had attempted to set up an operation similar to MDI before approaching Mackey. Nelson was directly involved in the creation of MDI, was aware of the problems caused by misrepresentation, and was aware that bootleg tapes would be sold by MDI. Nelson was aware of the financial problems being faced by MDI in July 1972 and of the plan to increase sales in order to generate cash to meet already existing obligations.

Nelson had first met Lester Fisher, who was hired to remedy MDI's financial situation, and had heard his

"pitch" in April, 1972, several months before Fisher was hired. Nelson discussed the new sales campaign with Fisher before it started, including the placement and contents of advertisements, the source of tapes, "singers list", and so forth. Nelson was taught the sales pitch by Fisher.

Testimony of Dennis Anderson, a distributor-victim, established that on August 28, 1972, the same month Fisher came to MDI, Nelson was selling distributorship in Minneapolis, Minnesota using the new "pitch" (1156-1161, 1163-1164). Anderson contacted Nelson after reading an MDI advertisement in the Minneapolis Star and Sunday Tribune. The advertisement (Ex 39A1 in Evidence, ft. nt. 7, *supra*) specifically mentioned Bill Nelson.

The evidence of Nelson's pre-MDI tape distributorship experience, his involvement in the creation of MDI, his training by Fisher, and the evidence of his direct sales activities, together with evidence of his knowledge about the problems due to misrepresentation in the sales presentations, about which Taylor spoke, and Mackey's comment about the buy-back agreement (that it was corporate obligation about which there was no need to worry (245)), provide a more than adequate basis for the jury to find that Nelson was aware of and participating in the fraudulent scheme of MDI. Similarly, there was substantial evidence from which the jury could find, beyond a reasonable doubt, that it was foreseeable to Nelson that the scheme would involve the use of the mails to place advertisements. Nelson's initial sales trip, after being taught the new "pitch" by Fisher, placed him in Minnesota in conjunction with an advertisement that appeared there bearing his name. The geographic area covered by the sales campaign made the use of the mails, which were stipulated to (1123), foreseeable by all the participants in the scheme. *United States* v. *Finkelstein*, *supra*, 526 F.2d at 527.

Mackey was similarly involved in the creation of MDI and had been briefed on the tape distributorship sales business, including the dangers of misrepresentation, by Taylor. It was Mackey who expressed the cavalier attitude towards the buy-back agreement; that it was a corporate obligation about which there was no need to worry. *See e.g. United States* v. *Cohen*, 516 F.2d 1358, 1367 (8th Cir. 1975). Unlike Nelson, Mackey did not have prior sales experience and he was not a party to the Fisher-Nelson-Taylor discussions concerning Fisher's sales campaign. But Mackey was aware of Fisher's background, including his propensity for misrepresentation, and Mackey had reviewed the promotional literature (Gov. Exhs. 17A-17B) and advertisements (e.g. Gov. Exh. 39A1) prepared at Fisher's direction. Mackey was also aware of the phony "singers list."

It was Mackey's idea that MDI sell its own way out of its financial difficulties by generating cash to meet already existing obligations. *See e.g. United States* v. *Uhrig*, 443 F.2d 239, 242 (7th Cir. 1971). Mackey was kept informed of the sales campaign. There was thus more than adequate evidence that Mackey could foresee that the mails would be used to place advertisements in distant newspapers in order to attract customers to the travelling salesmen.

Mackey was not convicted of any of the advertising mail counts for mailings prior to October 1, 1972. This date coincides with the meeting held between Mackey and Taylor in late September or early October, 1972 during which Mackey was informed of the difficulties that Taylor was having handling complaints.[9] Taylor had been designated by Mackey to handle complaints after

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[9] A similar meeting was held between Taylor and Nelson in late September or early October 1972.

Taylor warned Mackey that Fisher might generate a lot of problems through misrepresentations. It was during this meeting that Mackey reportedly told Taylor, referring to the complaining distributors, "keep them off my ass."

While it is the position of the government that a more than adequate basis existed to support a finding of guilty knowledge on the part of Mackey prior to October, 1972, the evidence concerning the Taylor-Mackey meeting clearly would support a finding of the requisite knowledge.[10]

Neither of the appellants were found guilty of the counts dealing with the mailings of checks by distributors to MDI. While the evidence would have supported a verdict of guilty on these counts, the jury may have found the evidence insufficient to support a finding beyond a reasonable doubt that the appellants, neither of whom were directly involved in receiving checks in the mail (871), knew that checks were being mailed in some cases, rather than hand delivered.[11] As a result of the

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[10] In his charge to the jury, the trial judge stated, "If he [a defendant] became aware of the fraud after the mailing and joined the scheme after the mailing, he cannot be convicted of the prior mailing, but he could be convicted of any subsequent mailing" (1603-1604).

[11] Mackey assigns as error the testimony of several of the distributor-victims that they were unemployed at the time they were victimized. He also complains about other testimony concerning hardship. In the case of Flynn and Connors, testimony concerning their employment status was not responsive to the government's questions. Yet no motion was made to strike. Testimony by witnesses Suk, Read, and Mellody was in response to a preliminary question as to where the witness was employed. No objections were made. Passing comment by the prosecutor in his closing remarks also was not objected to.

[Footnote continued on following page]

not guilty verdicts on the check mailing counts, Nelson also challenges the guilty verdicts directly as being in conflict with the not guilty verdicts. This challenge is without merit, both factually and legally. As has been set forth above, the verdicts of guilt and acquittal are neither inconsistent nor reconcilable. In any case, inconsistent verdicts among various charges of a multi-count indictment are not self-vitiating. *Dunn* v. *United States*, 284 U.S. 390 (1932); *United States* v. *Carbone*, 378 F.2d 420 (2d Cir.), *cert. denied*, 389 U.S. 914 (1967). See cases from other circuits collected in *United States* v. *Fox*, 433 F.2d 1235, 1238 n. 21 (D.C. Cir. 1970).

POINT II

The trial court's charge concerning conscious avoidance was proper.

Nelson argues that the portion of the charge to the jury dealing with conscious avoidance (1608 l. 7-15) is improper and constitutes reversible error. Nelson admits that there may have been some evidence of conscious avoidance concerning the fraudulent nature of the scheme but argues that there is no evidence of conscious avoidance concerning his knowledge of the use of the mails (Nelson's Brief, p. 48).

Failure to properly object constitutes a waiver of the objections. See *United States* v. *Bryant*, 480 F.2d 785, 792-93 (2d Cir. 1973); *United States* v. *Rose*, 527 F.2d 1026, 1027 (2d Cir. 1975). Nor can it be said that the error, if there was one, was anything more than harmless. The plight of the victims was not particularized by date. Many of the victims were sold distributorships prior to October 1972. Yet the jury carefully evaluated the evidence and found Mackey not guilty of the pre-October advertising counts and not guilty of all the mail counts that directly involved the victims, the check counts.

The challenged portion of the instructions appears in the section of the charge defining "intent to defraud".[12] It clearly was directed towards the element of knowledge of the fraud, and not the mailings. But even if the objected to portion of the charge could be read to direct itself towards the use of the mails, the evidence has Nelson fully informed about the advertising campaign and places him in Minnesota shortly after an advertisement referring to him was placed there. There clearly was evidence from which the jury could conclude that Nelson deliberately closed his eyes to the placing by mail of the advertisements in distant newspapers, advertisements that he used to earn commissions.

Relying on *United States* v. *Bright*, 517 F.2d 584, 588 (2d Cir. 1975) Nelson argues that there was a

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[12] To act with "intent to defraud" means to act knowingly and with specific intent to deceive, ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself or some financial gain to another—and I say you don't have to actually gain anything from the scheme in order to be guilty.

An act is not knowing if it is committed because of inadvertence, carelessness, negligence, stupidity or some other non-criminal reason.

You should acquit the defendants if you are not satisfied beyond a reasonable doubt that they knew of the fraudulent activities of others in the company and permitted these activities to continue when they should have stopped them and had full power to stop them, or that they themselves engaged in such activities.

One may not willfully and intentionally remain ignorant of a fact important and material to his conduct in order to escape the consequences of the criminal law.

The defendants could not deliberately close their eyes to what was going on around them in order to permit them to contend that they were deceived by their associates.

The state of mind of a defendant must be inferred from the circumstances as revealed by the evidence and on the basis of your common sense and general experience (1607-1608).

failure to give a balanced charge. But immediately preceding the challenged portion of the charge, the judge stated:

> "You should acquit the defendants if you are not satisfied beyond a reasonable doubt that they knew of the fraudulent activities of others in the company and permitted these activities to continue when they should have stopped them and had full power to stop them, or that they themselves engaged in such activities" (1607-1608).

Reading the charges as a whole, *United States* v. *Bright*, *supra*, the proper standard to be applied to knowledge was charged. In *United States* v. *Phillip J. Gentile and Hunter B. Brashier*, —F.2d— (slip op., Nos. 497, 499, 2d Cir., decided February 10, 1976), at 1866, the court stated, in upholding a similar charge.

> "Our conclusion is supported by the fact that the trial judge scrupulously avoided use of the technical and confusing phrase "reckless disregard," which caused both judge and jury difficulty in *United States* v. *Bright*, *supra*. While no particular word or words determine the adequacy of the charge, here the instruction relating to knowledge was given in terms of the more concrete expression "deliberate disregard," which implies that knowledge could be inferred if the jury found that the defendant was aware of the risk that his conduct was illegal but proceeded nonetheless."

Similar, more concrete language ("One may not willfully and intentionally remain ignorant. . . . The defendants could not deliberately close their eyes . . .") was used by the trial judge and thus the charge was proper and adequate.

POINT III

Judge Weinstein properly refused to permit the introduction into evidence of appellants' complaint letters to the Nassau County District Attorney's Office and the District Attorney's memorandum concerning their complaint.

Shortly after Taylor had left MDI and after the fraudulent scheme had largely run its course, appellants wrote lengthy self-serving complaints to the Nassau County District Attorney's Office (defendants' Exhibit R, A-42 [appellant Nelson's appendix]). Subsequently, a handwritten "Memorandum-Complaint" was prepared by the Nassau County District Attorney's Office based upon the statements made in the letter and an interview with the appellants (see defendants' Exhibit Q, A-40 [appellant Nelson's Appendix]).

During the course of the trial appellants sought to introduce the foregoing documents in evidence to establish the truth of the matters asserted in them (1258-1264). Judge Weinstein, although he recognized that he was not required to do so, permitted these appellants to bring before the jury the fact that they had made a complaint to the District Attorney. As stated by Judge Weinstein, "I'm going too far already in allowing you to put in the fact that there was a complaint. I will allow it on the question of the state of mind. That's all." (1262). ". . . I'll allow it out of mercy to the defendants, but that's all." (1263). Indeed, to achieve its merciful aims the Court directed Government counsel to stipulate that if the District Attorney were called to testify he would state that a complaint had been made about Mr. Taylor by these defendants. Nevertheless, Judge Weinstein's compassion for these appellants did not extend so far as to permit him to ignore completely

the rules of evidence. Thus, Judge Weinstein found that the contents of Exhibits Q and R were, in view of the inability of Government counsel to cross-examine the declarant-defendants who had not taken the stand, utter hearsay. (See *United States* v. *Pecelli*, 491 F.2d 1108, 1116 (2d Cir. 1974).)

POINT IV

Testimony given by Mackey's attorney before the Grand Jury did not violate any privilege of Mackey and did not form a basis for dismissing the indictment.

Mackey moved to dismiss the indictment against him on the grounds that his attorney-client privilege had been violated before the Grand Jury. Mackey's business attorney had been called before the Grand Jury to testify about the incorporation of MDI. The motion was denied and the trial judge subsequently wrote a lengthy and exhaustive opinion, not mentioned by appellant, but reported as *United States* v. *Mackey*, 405 F. Supp. 854 (E.D.N.Y. 1975).

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[13] Of course, Judge Weinstein indicated that if these appellants wished to testify concerning their actions in December, they could; "If they have anything to say they will take the stand." (1263). We add as well Judge Weinstein's observation that were the complaint as well as the report admitted in evidence the defendants would have been severely prejudiced by the revelation that the District Attorney's office did not see fit to act upon the complaint (see 1262). Indeed, during colloquy it developed that the Assistant District Attorney, Steiner, had requested an audit from the appellants, but had never received it (1261-1262). Thus, by directing the Government to stipulate that the complaint had been made, without further elaboration, Judge Weinstein secured for the defendants the best of all possible worlds.

Prior to presenting Mackey's attorney, Mr. Mazza, to the Grand Jury, the Assistant United States Attorney and Mazza carefully considered in advance whether any problems were raised by the attorney-client privilege and concluded that Mazza's testimony would not violate the privilege. *United States* v. *Mackey*, *supra*, 405 F. Supp. at 867. Thereafter Mazza testified that he had been retained by Mackey to draw up incorporation papers for MDI.

Identity of a client and the date and general nature of legal services rendered are not privileged "even though the fact of having retained counsel may be used as evidence against the client." *Colton* v. *United States*, 306 F.2d 633, 637 (2d Cir.), *cert. denied*, 371 U.S. 951 (1963).

The trial judge examined the grand jury testimony in the light of *United States* v. *Calandra*, 414 U.S. 338, 345 (1974) (quoting *Lawn* v. *United States*, 355 U.S. 339, 350 (1958)) ("an indictment valid on its face is not subject to challenge on the grounds that the grand jury acted . . . on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination") and found that there was overwhelming evidence of the appellant's mail fraud, other than Mazza's testimony, that had been presented to the grand jury. *United States* v. *Mackey*, *supra*, 405 F. Supp. at 862. Both Fisher and Nelson testified before the Grand Jury, more than adequately establishing the existence of the joint venture. Thus even if an attorney-client privilege was involved, there was no basis to dismiss the indictment.

POINT V

The denial of Nelson's request for pre-trial adjournments was not error.

The indictment in this action was filed on June 5, 1975. On June 23, 1975 the trial court appointed the Legal Aid Society to represent Nelson and set the case for trial on September 29, 1975. The Government filed its notices of readiness on June 23, 1975.

On September 17, 1975 Mackey moved for an adjournment of the trial and this was denied. On September 24, 1975 Nelson requested the substitution of counsel. This was granted, substituting David W. McCarthy. On September 26, 1975, the Friday before the scheduled Monday starting date of the trial, McCarthy requested an adjournment. This was denied. Nelson assigns this denial as error, arguing that it denied him effective assistance of counsel, a fair trial, and due process.

On the 24th of September, 1975, when Nelson's request for a substitution first came before the court, Nelson was informed that no adjournment would be granted as a result of the substitution. (Minutes of September 24, 1975 Hearing, p. 3). Mr. Kelly, the previously assigned legal aid attorney, stated that he was fully prepared to proceed to trial representing Nelson and that he had conducted extensive discovery. (Minutes of September 24, 1975 Hearing, p. 4).

On the afternoon of the 24th of September, 1975, the substituted counsel, McCarthy, indicated he could handle the case, but requested a short adjournment. (Minutes of September 24, 1975 Hearing, p. 6). This was denied (6).

On the 26th of September, 1975, the Friday preceding the Monday commencement of trial, McCarthy again moved for an adjournment. (Minutes of September 26, 1975 Hearing, p. 3). The court stated:

> "I think you will be ready. I think the presence of your client will assist you.
>
> His last minute request for a change of Counsel created the problem. But, if I thought there couldn't be adequate preparation I would nonetheless grant an adjournment.
>
> If during the course of the trial an adjournment is necessary to protect your client, I will of course give him one."

(Minutes of September 26, 1975 Hearing, p. 3). Nelson never requested any continuance during the course of the trial which ran for eight days before going to the jury.

Nelson argues that the denial of a pre-trial adjournment prevented his counsel from adequately preparing for trial due to the large number of documents. On the day of his substitution, Legal Aid presented all the materials, previously provided through discovery, to McCarthy. (Minutes of September 24, 1975 Hearing, p. 6). The Government also offered additional discovery and assistance (6).

Nelson also argues that the geographic dispersion of possible witnesses required additional time for preparation. He does not indicate what these additional witnesses would testify to or add to the defense. An investigator was assigned to Nelson on September 26, 1975. (Minutes of September 26, 1975 Hearing, p. 4). During the course of the eight day trial, as well as over the two weekends, Nelson would have had more than ample time

to secure any witnesses he needed. See *United States* v. *Sanchez*, 483 F.2d 1052, 1058 (2d Cir.), *cert. denied*, 415 U.S. 991 (1974). In any case, Nelson never requested a continuance to secure these witnesses.

The decision to grant or deny a pre-trial adjournment lies in the sound discretion of the trial judge. *United States* v. *Carroll*, 510 F.2d 507, 510 (2d Cir. 1975). In the case at bar, as in *Carroll*, where there were no requests for continuance during the trial, the decision of the trial court to proceed to trial following a last minute substitution of counsel was not error.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: May 28, 1976

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N. JOHNSON, being duly sworn, says that on the 28th day of May, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, A TWO COPIES OF THE BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Frederick E. Weinberg, Esq.
515 Madison Avenue
New York, New York 10022

McCarthy &Dorfman, Esqs.
1527 Franklin Avenue
Mineola, New York 11501

Sworn to before me this
28th day of May, 1976

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1977

Carolyn N. Johnson
CAROLYN N. JOHNSON